Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

SHIRLEY K. ROGERS, et al.,
Petitioners,

v.

WAL-MART STORES, INC,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When a federal district court is determining whether the amount-in-controversy requirement has been met in a case removed based on diversity of citizenship, is the court absolutely barred from considering a post-removal stipulation committing the plaintiff to damages less than the federal jurisdictional minimum?

When a federal district court is determining whether the amount-in-controversy requirement has been met in a case removed based on diversity of citizenship, what burden of proof applies?

When a federal district court is determining whether the amount-in-controversy requirement has been met in a case removed based on diversity of citizenship and the state court complaint specifically demanded damages less than the federal jurisdictional minimum, can the federal court's determination ever be dependent on whether pleading rules in the state from which the action was removed treat the plaintiff's damage demand as a limit on recovery?

PARTIES TO THE PROCEEDINGS

Petitioner

Shirley K. Rogers is an individual with no corporate affiliations.

Respondent

Wal-Mart Stores, Inc.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit in Case No. 99-6348 is reported at 230 F.3d 868 (6th Cir. 2000) and reproduced, along with that court's judgment, at Appendix A, p. 1a. The unreported decision of the United States District Court for the Western District of Tennessee denying plaintiff's motion to remand is reproduced at Appendix B, p. 18a.

JURISDICTION

The Sixth Circuit entered its judgment and issued its decision on October 26, 2000. App. A, p. 16a. This Court has jurisdiction to review the decision of the Sixth Circuit by writ of certiorari, pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED IN THIS CASE

This case involves 28 U.S.C. § 1447, which is reproduced at Appendix C, p. 22a.

STATEMENT OF THE CASE

This case arises out of injuries suffered by plaintiff-petitioner Shirley K. Rogers ("Rogers" or "plaintiff") on October 19, 1996, when she tripped and fell on a wooden pallet in the aisle of a Wal-Mart store located in Memphis, Tennessee. Rogers contends that store employees negligently obstructed the aisle.

On October 17, 1997, Rogers filed a complaint with the Tennessee state court, asserting negligence claims against Wal-Mart Stores, Inc. ("Wal-Mart" or "defendant") and

seeking compensatory damages totaling $450,000 and punitive damages totaling $500,000. Wal-Mart answered and removed the case to the United States District Court for the Western District of Tennessee. While that case was pending in federal court, plaintiff stated, in response to one of Wal-Mart's interrogatories, that her damages totaled $447,902.46. Thereafter, the parties filed a stipulation to dismiss that case without prejudice and the court entered an order to that effect.

On February 4, 1999, Rogers filed another action in state court against Wal-Mart, arising out of the same incident. In her second complaint, Rogers prayed for damages "not exceeding $75,000.00." Wal-Mart removed the new case to the United States District Court for the Western District of Tennessee as well, based on plaintiff's interrogatory answer in the first action. Wal-Mart also moved for costs and attorney fees resulting from dismissal of the first action, pursuant to Federal Rule of Civil Procedure 41(d).

Rogers filed a timely motion to remand, asserting that the amount-in-controversy requirement for diversity of citizenship jurisdiction had not been met. Filed with that motion were (1) a letter from plaintiff's counsel to Wal-Mart's counsel, (2) plaintiff's affidavit, and (3) Plaintiff's Stipulation on Damages. Counsel's letter pointed out that the new state court complaint "only seeks an amount not exceeding $75,000.00." Rogers' affidavit stated that, in her new state court complaint, she "made a demand for compensatory damages in an amount not exceeding $75,000.00," that she had "no intention of seeking additional damages," and that she had "instructed" her attorney "to stipulate that our demand for damages will not exceed $75,000.00 at any time in the future." Plaintiff's Stipulation on Damages stated that "the total amount of damages she seeks does not exceed $75,000.00" and that "Plaintiff will

not, at any time in the future, seek leave of court to amend her complaint for additional damages."

On June 23, 1999, the district court denied Rogers' motion to remand and granted Wal-Mart's Rule 41(d) motion for costs, including attorney fees. The court also stayed the proceedings until Rogers paid the costs and fees. When Rogers failed to do so, the district court entered a judgment dismissing the second action without prejudice. Rogers filed a timely notice of appeal.

The Sixth Circuit affirmed the denial of plaintiff's motion to remand.[1] Despite acknowledging that "a claim specifically less than the federal requirement" generally "should preclude removal," the court held that it was necessary to look beyond the second complaint's demand for "damages not exceeding $75,000.00" because, under Tennessee Civil Rule 54.03, such a demand is not binding on a plaintiff. App. A, p. 4a. The court thus examined evidence outside the second complaint to determine if "it is 'more likely than not' that the plaintiff's claims meet the amount in controversy requirement." Id. at 5a. In upholding the district court's determination on that point, the Sixth Circuit attached great weight to the fact that plaintiff's complaint in the first action contained a demand for $950,000 and her interrogatory answer in that case had placed damages at more than $400,000. Id.

The court of appeals also held that plaintiff's stipulation and affidavit in the second action were of "no

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[1] The Sixth Circuit vacated the order requiring Rogers to pay Wal-Mart's attorney fees resulting from the first dismissal. The second action has not been reinstated.

effect" because, under St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938), a court cannot assess jurisdiction based on "events occurring after removal that reduce the amount in controversy," but rather must limit its consideration to evidence in existence "as of the time of removal." App. A, p. 7a. Thus, even though the Sixth Circuit regarded plaintiff's stipulation as binding, it concluded that "the interests of simplicity and uniformity dictate that post-removal stipulations be treated just like any other post-removal events." Id. at 8a.

REASONS WHY THE PETITION SHOULD BE GRANTED

A. The Sixth Circuit's Holding Barring District Courts From Considering *Any* Post-Removal Stipulations, Although Ostensibly Based On This Court's Decision In St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938), Actually Misapplies That Decision And Is Inconsistent With The Fifth Circuit's Decision In ANPAC v. Dow Quimica de Colombia, 988 F.2d 559 (5th Cir. 1993).

The Sixth Circuit's decision identifies "the main issue" in this case as "the effect, if any," of the plaintiff's post-removal stipulation on the district court's remand decision. Id. at 6a. Based on its reading of St. Paul Mercury, a plaintiff's post-removal stipulation stating that the damages sought are less than the jurisdictional minimum cannot have any effect on such a decision. Id. at 9a. According to the Sixth Circuit, it is inconsistent with St. Paul Mercury for a district court deciding a remand motion to consider any stipulation or affidavit that did not exist "as of the time of removal." Id. at

10a.[2] The Sixth Circuit interprets St. Paul Mercury as requiring that *all* post-removal stipulations or affidavits "be treated like any other post-removal event" and disregarded. Id. at 8a-10a. In stating this rule, the Sixth Circuit draws no distinction between post-removal stipulations that attempt to *change* the amount of the plaintiff's damage claim and those that do not. Thus, courts following the Sixth Circuit's blanket rule will be required to disregard *all* post-removal stipulations, even binding ones that irrevocably bar a plaintiff from seeking or accepting more than the stipulated damage amount once the case is remanded to state court. Id.

The Sixth Circuit's blanket rule misapplies St. Paul Mercury and conflicts with the Fifth Circuit's decision in ANPAC v. Dow Quimica de Colombia, 988 F.2d 559 (5th Cir. 1993), rehearing *en banc* denied 5 F.3d 530, cert. denied *sub. nom.* Dow Chemical v. ANPAC, 510 U.S. 1041, 114 S.Ct. 685 (1994).

In ANPAC, the Fifth Circuit noted that St. Paul Mercury barred consideration only of post-removal amendments, stipulations, and affidavits that seek to *reduce* plaintiffs' already specified damage claims from something above to something below the jurisdictional minimum. Id. at 656, citing St. Paul Mercury, 303 U.S. at 292, 58 S.Ct. at 592. According to the Fifth Circuit's holding in ANPAC – and contrary to the Sixth Circuit's holding in this case – under certain circumstances, a district court *may* consider a

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[2] The Seventh Circuit adopted the same rule in In re Shell Oil, 970 F.2d 355, 356 (7th Cir. 1992), stating: "Litigants who want to prevent removal must file a binding stipulation or affidavit with their complaints; once a defendant removes the case, *St. Paul* makes later filings irrelevant."

plaintiff's post-removal stipulation or affidavit that does not attempt to reduce an already specified damage claim from above to below the jurisdictional minimum.[3]

The Fifth Circuit's holding in ANPAC is consistent with the balance that St. Paul Mercury struck between ensuring that post-removal events "which *reduce* the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction *once it has attached*" and allowing the plaintiff to remain the master of the claim. St. Paul Mercury, 303 U.S. at 293, 294, 58 S.Ct. at 592-93 (emphasis added). The Sixth Circuit's rule disrupts that balance, however, especially when applied to cases complicated by state pleading rules adopted after St. Paul Mercury. The instant case and ANPAC both involve state rules adopted after that decision.

In St. Paul Mercury, the Court assumed that a plaintiff filing an action in state court who "does not desire to try his case in the federal court" legitimately could prevent diversity-based removal by "suing for less than the jurisdictional amount," even "though he would be justly entitled to more .

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[3] The Fifth Circuit disapproved an unrelated aspect of ANPAC in Marathon Oil v. Ruhrgas AG, 145 F.3d 211 (5th Cir. 1998) (*en banc*), but this Court reversed that decision in Ruhrgas AG v. Marathon Oil Co., 524 U.S. 574, 119 S.Ct. 1563 (1999). The Fifth Circuit has indicated elsewhere, however, that post-removal affidavits sometimes can be considered to resolve a jurisdictional amount. DeAguilar v. Boeing, 47 F.3d 1404, 1406 (5th Cir. 1995) (citing ANPAC). The Third Circuit also has suggested that, in considering a remand motion, "a court justifiably might consider a subsequent stipulation as clarifying rather than amending an original pleading." Angus v. Shiley, Inc., 989 F.2d 142, 145 n. 3 (3d Cir. 1993).

. . ." Id. at 294. When this Court assumed that the plaintiff could remain the master of the claim merely by using that pleading approach, it could not have known the ways in which state pleading rules promulgated after St. Paul Mercury would make that more complicated.

At common law, the plaintiff was required to plead the amount claimed and that became the upper limit of his or her recovery. Singer v. State Farm Mutual Auto Ins. Co., 116 F.3d 373, 375 (9th Cir. 1997). A growing number of states now prohibit a plaintiff from pleading the amount claimed, at least in certain types of cases. Even though other states still permit specific damage allegations, the majority have adopted the rule, analogous to Federal Rule of Civil Procedure 54(c), that a plaintiff may recover more than the amount claimed. In different ways, these two types of rules are perceived as posing special analytical challenges, understandably unforeseen in St. Paul Mercury, when a plaintiff who "does not desire to try his case in the federal court" legitimately endeavors to prevent diversity-based removal of his state court action.

An increasing number of courts – the Sixth Circuit being a notable exception – wisely have concluded that the best solution to the analytical challenges posed by these state pleading rules lies in allowing plaintiffs to file *binding* post-removal stipulations or affidavits, by which they can *confirm* or *clarify*, but never *reduce*, their damage claims. *See*, *e.g.*, Cole v. Great Atlantic & Pacific Tea Co., 728 F.Supp. 1305, 1309 (E.D.Ky. 1990); Griffin v. Holmes, 843 F.Supp. 81, 88 (E.D.N.C. 1993); Hall v. Travelers Ins. Co., 691 F.Supp. 1406, 1410 (N.D.Ga. 1988); Oder v. Buckeye State Mut. Ins., 817 F.Supp. 1413, 1413-14 (S.D.Ind. 1992); Matney v. Wenger Corp., 957 F.Supp. 942, 944 (S.D. Tex. 1997); Moss v. Voyager Ins. Co., 43 F. Supp.2d 1298, 1301-04

(M.D.Ala. 1999); *see also* Angus v. Shiley, Inc., 989 F.2d at 145 n. 3.

In ANPAC, for instance, the plaintiffs' problem was that a state court rule prohibited them from specifying the amount they were claiming. ANPAC, 988 F.2d at 562. That rule made it impossible for them to prevent removal by pleading damages less than the jurisdictional amount, as St. Paul Mercury had sanctioned. Under those circumstances, the Fifth Circuit concluded that a post-removal stipulation or affidavit offered a common-sense solution that was faithful to St. Paul Mercury:

> Although [the defendant] is correct that a plaintiff may not defeat removal by subsequently *changing* his damage request, because post-removal events cannot deprive a court of jurisdiction once it has attached, *St. Paul Mercury*, 303 U.S. at 292, 58 S.Ct. at 592, in this case the affidavits clarify a petition that previously left the jurisdictional question ambiguous. Under those circumstances, the court is still examining the jurisdictional facts *as of the time* the case is removed, but the court is considering information submitted after removal.

ANPAC, 988 F.2d at 565 (emphasis in original).

A number of district courts have drawn the same distinction in diversity-based removal cases and have considered post-removal stipulations or affidavits that *clarify* the amount in controversy by supplying specific damage amounts not contained in the plaintiffs' state court complaints. Cole, 728 F.Supp. at 1309; Moss, 43 F.Supp.2d at 1304;

Oder, 817 F.Supp. at 1414; Griffin, 843 F.Supp. at 88; Adkins v. Gibson, 906 F.Supp. 345, 348 (S.D.W.V. 1995); *cf.* Fuller v. Exxon Corp., 78 F. Supp.2d 1289, 1295 (S.D.Ala. 1999). Those courts allow stipulations or affidavits with the understanding that they will be *binding* on the plaintiff in both federal court and state court.

Under the facts presented in this case, courts not only have considered, but have treated as controlling, post-removal stipulations or affidavits whose purpose is to *confirm irrevocably* what the plaintiff had alleged in the state complaint, namely that the damages claimed are less than the federal jurisdictional minimum. Matney, 957 F.Supp. at 944; Hall, 691 F.Supp. at 1410.

By foreclosing consideration of *any* post-removal stipulations or affidavits – even binding ones that merely confirm already pleaded damage amounts[4] – the Sixth Circuit dismissed this entire body of case law and misapplied St. Paul Mercury. By granting certiorari, this Court can establish a uniform practice for dealing with post-removal stipulations, which is faithful to St. Paul Mercury and takes into account the confounding state pleading rules that have been promulgated since that case.

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[4] Ironically, the Sixth Circuit gave "no effect" to that which the law regards as binding (*i.e.*, the stipulation), but gave great weight to that which the law considers inoperative (*i.e.*, the complaint from the earlier dismissed action).

B. The Sixth Circuit's Application Of The "Preponderance Of The Evidence" Standard Conflicts With The Eleventh Circuit's Decision In Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994), And Is Another In The Wide Array Of Burdens Of Proof That Federal Courts Have Imposed On Removing Defendants.

Under a Tennessee state rule akin to Federal Rule 54(c), the state complaint's demand for damages "not exceeding $75,000.00" would not have limited plaintiff's recovery, causing the Sixth Circuit to look for other evidence of the amount in controversy. Because plaintiff had taken a "belt and suspenders" approach to establishing the amount in controversy, the court of appeals also had before it plaintiff's stipulation and her affidavit, which, the court acknowledged, constituted her binding commitment not to seek or accept more than the federal jurisdictional minimum. But the Sixth Circuit chose not to treat either the stipulation or the affidavit as establishing the amount in controversy. Instead, it looked to other evidence, ultimately concluding that plaintiff's damage prayer and interrogatory answer in an earlier dismissed action made it "'more likely than not' that the plaintiff's claims meet the amount in controversy requirement." App. A, p. 5a.

The Sixth Circuit's application of the "preponderance of the evidence" standard, a view apparently shared by the Fifth Circuit,[5] is part of the crazy quilt of proof burdens that courts have imposed on removing defendants. In Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994), as in this

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[5] DeAguilar v. Boeing Co., 47 F.3d 1404, 1412 (5th Cir.), *cert. denied* 516 U.S. 865, 116 S.Ct. 180 (1995).

case, the plaintiff's state court complaint specified damages less than the federal minimum, but the Eleventh Circuit applied a more stringent burden than the Sixth Circuit, requiring the defendant to "prove to a *legal certainty* that plaintiff's claim *must* exceed [the jurisdictional amount]." Id. at 1094 (emphasis added). In other cases in which the plaintiff's state court complaint specified damages less than the federal jurisdictional minimum, district courts have employed a variety of tests to assess removal jurisdiction, including the "substantial likelihood" and the "reasonable probability" standards. *See cases listed in* Gafford v. General Electric Co., 997 F.2d 150, 158 (6th Cir. 1993).

A survey of cases in which the state court complaint left the claimed damages uncertain reveals even more varied burdens of proof, including tests that required defendants to prove grounds for removal to a "legal certainty," by a "preponderance of the evidence," to "some reasonable probability," or to a "reasonable likelihood." Id.; 14C Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters 3d* § 3725, pp. 89-92 (1998). Some courts have inverted the "legal certainty" test, requiring the defendant merely to show that it does *not* appear to a legal certainty that the amount in controversy falls below the federal jurisdictional minimum. Id. at 92. Still other courts have decided remand motions without articulating any burden of proof at all. Id. at § 3725, pp. 92-93; *see* Gwyn v. Wal-Mart Stores, Inc., 955 F.Supp. 44, 46 (M.D.N.C. 1997) (the court reviewed the various tests, but ruled it was not necessary to choose one).

The lack of a uniform burden of proof for assessing the amount in controversy in removal cases has a practical and negative effect on the ability of federal district courts to handle removed cases and fosters uncertainty among parties

and even forum manipulation by certain litigants. There is no reason why the standard for removability should depend on where the state court action is commenced. Only this Court can assure the orderly and uniform administration of the removal statutes.

C. By Holding That Removal Jurisdiction Can Depend On Whether A State Complaint's Damage Prayer Is Binding Under State Law, The Sixth Circuit Adopted A New Removal Rule That Conflicts With St. Paul Mercury, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104, 61 S.Ct. 868, 870 (1941), And Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994).

In choosing to look beyond the fact that the operative state court complaint claimed damages below the jurisdictional minimum, the Sixth Circuit departed radically from St. Paul Mercury, adopting what amounts to a new exception to that decision. That exception swallows St. Paul Mercury, is contrary to another of this Court's decisions, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104, 61 S.Ct. 868, 870 (1941), and conflicts with the Eleventh Circuit's decision in Burns v. Windsor Ins. Co., 31 F.3d 1092.

In St. Paul Mercury, this Court carefully distinguished removed cases from cases originally brought in federal court. As to the latter, a plaintiff's "good faith in choosing a federal forum is open to challenge not only by resort to the face of his complaint," but by other evidence as well. St. Paul Mercury, 303 U.S. at 290. In contrast, "the status of the case as disclosed by the plaintiff's complaint is *controlling* in the case of a removal . . . ." Id. (emphasis added). The Court in St. Paul Mercury further stated that, by "resort[ing] to the

expedient of suing for less than the jurisdictional amount," a plaintiff filing a state court action legitimately could prevent its removal. Id. at 294.

Although acknowledging that the state court complaint's specific claim for damages "not exceeding $75,000.00" "generally" would be enough to defeat removal under St. Paul Mercury, the Sixth Circuit nevertheless held it was not controlling for the explicit reason that, under Tennessee Civil Rule 54.03, such a demand is not binding on a plaintiff. App. A, p. 4a-5a. Given the Sixth Circuit's recognition that the stipulation was binding, the court could have resorted to it to assuage any concern caused by the Tennessee rule. Instead, the Sixth Circuit in effect endorsed a new exception to St. Paul Mercury. Although St. Paul Mercury's rule has long been subject to a "bad faith" exception, 14C Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters 3d* § 3725, p. 98 (1998), applying it subject to characterizations that vary from state to state is inherently problematic.

Under the Sixth Circuit's holding, a district court considering a remand motion need not treat as controlling the state complaint's express claim for an amount below the jurisdictional minimum *if* the case was removed from a state court governed by an analog to Federal Rule 54(c). In other words, a case's removability would turn on whether or not it was filed in a state court in which the complaint's prayer limits his ultimate recovery. Given that the states with rules akin to Federal Rule 54(c) now comprise a majority, this exception to St. Paul Mercury, if followed elsewhere, would nullify the requirement that the state complaint's damage allegations be treated as "controlling" absent bad faith. 14C Wright, Miller & Cooper, *Federal Practice and Procedure:*

Jurisdiction and Related Matters 3d § 3725, pp. 96, 98 (1998).

Allowing removal jurisdiction to hinge on state law characterizations also is flatly contrary to a principle that this Court announced sixty years ago and has followed unwaveringly ever since. In Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. at 104, 61 S.Ct. at 870, the Court stated that the removal statute,

> which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.

Under the Sixth Circuit's new rule, identical actions could be filed in two different states and one could be deemed removable and the other not, depending solely on whether the states involved characterize damage prayers as binding or non-binding. That rule is incompatible with Shamrock Oil and the proper operation of the removal statutes.

That rule also conflicts with the Eleventh Circuit's decision in Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994), in which the plaintiff's state court complaint explicitly prayed for an amount below the federal jurisdictional minimum (*i.e.*, "not more than $45,000.00"). Stressing that Alabama Civil Rule 54(c) would allow the jury to award the plaintiff more than she prayed for, the defendant urged the Eleventh Circuit to uphold removal, despite the

complaint's prayer. The defendant proposed a new rule that would allow removal, regardless of a state complaint's prayer, if there were any possibility that the plaintiff would be awarded more than the federal jurisdictional amount. Burns, 31 F.3d at 1096-97. The Eleventh Circuit rejected such a rule, noting that it "would unacceptably broaden removal jurisdiction" and "could lead to inconsistent applications of federal jurisdictional rules." Id. at 1097, citing "14A Wright & Miller, *Federal Practice and Procedure* §§ 3702, 3725." The Eleventh Circuit also noted that, as of the time of removal, "the plaintiff's complaint specified $45,000 in damages" and the fact "[t]hat plaintiff *might* ask for or recover more *after* removal is not sufficient to support jurisdiction." Burns, 31 F.3d at 1097 n. 13 (emphasis in original).

State analogs to Federal Rule 54(c) do not warrant judicial adoption of a new rule that would lead to inconsistent applications of the removal statutes. The Burns court pronounced itself

> unwilling, without congressional guidance, to construe the removal statute in such a way that it would expand federal court jurisdiction or promote inconsistent application of the removal rule.

Id. at 1097; *but see* DeAguilar v. Boeing, 47 F.3d at 1412 n. 10. Yet, that is precisely what the Sixth Circuit has done by acknowledging that the amounts prayed for in state court complaints henceforth will be analyzed differently depending on whether the case originated in a state where that amount limits or does not limit the plaintiff's recovery.

The Sixth Circuit eschewed a simpler, sounder practice for dealing with state analogs to Federal Rule 54(c) in removal cases. A solution completely consistent with St. Paul Mercury's guaranty that a plaintiff can legitimately prevent removal and with Shamrock Oil's demand for uniform application of the removal statute is "to treat the amount requested by the plaintiff in state court as the amount in controversy. To hold that state rules similar to Federal Rule 54(c) place an unlimited amount in controversy, in effect, would abolish the $75,000 requirement as a limitation on removal jurisdiction in states that have such a procedural rule." 14C Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters 3d* § 3725, p. 98 (1998). This case affords the Court the opportunity to shape a uniform practice for dealing with state analogs to Federal Rule 54(c) that is compatible with both St. Paul Mercury and Shamrock Oil.

This case and the confusion in the practices described above illustrate why St. Paul Mercury and its assumptions should be reviewed and either be reaffirmed or clarified and possibly embellished in the light of developments in the more than sixty years since it was rendered. The case was decided before, albeit shortly before, the advent of the Federal Rules of Civil Procedure and the tectonic shift occasioned by Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Under those circumstances, any decision needs revisiting. *See, e.g.*, United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966). Moreover, if St. Paul Mercury merits a fresh look in light of state rules akin to Federal Rule 54(c), the same might be said of original jurisdiction cases, which are governed by Federal Rule 54(c) itself. If the Sixth Circuit's view of the implications of analogous state rules were applied to that Rule, it would have enormous repercussions for both

original and removed cases. 14C Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters 3d* § 3725, p. 98 (1998). Actions could be initiated in or removed to federal court without regard to the amount of the complaint's monetary demand, which eventually could blur the line that St. Paul Mercury drew between original and removal jurisdiction. St. Paul Mercury, 303 U.S. at 288-90. Thus, this case could provide an opportunity for the Court to reexamine another aspect of St. Paul Mercury, namely whether, as has been questioned, there still is a rational basis for differentiating between the methods and burdens of proving amount in controversy in cases initiated in federal court and those in cases removed to federal court. Id.; *see also* the dissenting opinion by Judge Jolly in Kliebert v. Upjohn Co., 915 F.2d 142, 147-49 (5th Cir. 1990) (rehearing *en banc* granted, appeal dismissed due to settlement).

D. This Case Presents Several Important Federal Questions That Are Central To The Ability Of District Courts To Apply The Removal Statute Uniformly And To Resolve Remand Issues Coherently.

Orders granting or denying motions to remand are not appealable. 28 U.S.C. § 1447(d); Chicago, R.I.& P.R. Co. v. Stude, 346 U.S. 574, 578, 74 S.Ct. 290, 293 (1954). Opportunities for courts of appeals to consider either type of order are exceedingly rare. Therefore, most of the case law regarding amount in controversy in removal cases takes the form of unreviewed district court opinions. The rare exceptions occur by happenstance,[6] usually long after the

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[6] Appellate review came about in this case because plaintiff failed to pay costs and fees, pursuant to Rule 41(d), and so her action was

remand motion was decided and sometimes not until after a case has gone to trial. *See, e.g.*, St. Paul Mercury.

Given the infrequent appellate review, it is not surprising that the district court opinions offer a dizzying array of contradictory holdings and that the court of appeals decisions lack consistency as well. Taken together, the district court and court of appeals decisions since St. Paul Mercury comprise an alarmingly inconsistent and confusing jumble of case law.[7] Moreover, the dearth of opportunities

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dismissed.

[7] For examples of this, *compare* Coleman v. Southern Norfolk, 734 F.Supp. 719, 721 (E.D.La. 1990) (in remanding, the court disregarded damage demands in complaints arising from the same incident) *with* Cedus v. Asplundh Tree Expert Co., 759 F.Supp. 319, 321 (in denying remand, the court relied on awards from unrelated cases generally involving similar injuries); *and compare* Gwyn v. Wal-Mart Stores, Inc., 955 F.Supp. 44, 46 (M.D.N.C. 1997) (plaintiff's $50,000 settlement offer and his counsel's letter stating the claim was worth more were not sufficient to establish the requisite $50,000 amount in controversy) *and* Standridge v. Wal-Mart Stores, Inc., 945 F.Supp. 252, 256 (N.D.Ga. 1996) (plaintiff's $75,000 settlement offer was not "a reliable indicator of the damages plaintiff is seeking") *with* Mullins v. Harry's Mobile Homes, Inc., 861 F.Supp. 22, 24 (S.D.W.Va. 1994) (because "settlement offers routinely represent a discount," the court held that plaintiff's $45,000 settlement offer was sufficient to establish the jurisdictional amount) *and with* Chase v. Shop 'n Save Warehouse Foods, 110 F.3d 424, 428 (7th Cir. 1997) (defendant's $4,400 settlement offer did not accurately reflect the amount in controversy); *see also* Goodman v. Wal-Mart Stores, Inc., 981 F.Supp. 1083, 1084 (M.D.Tenn. 1997) (notwithstanding St. Paul Mercury, 28 U.S.C § 1447(c), as amended in 1988, mandates remand even when the plaintiff files a post-removal amended

for circuits to resolve the most critical issues in this area – *e.g.*, post-removal stipulations, burdens of proof, the implications of state rules, and the evidence that may be considered – only portends more confusion, which will continue to generate inconsistency and foster uncertainty in the courts and among litigants.

The fact that the circuits have had relatively few opportunities to sort out the important issues presented ought to make it more compelling, not less so, for this Court to become involved in this case, simply because that situation is not likely to change any time soon. This Court's superintendence is needed in this area of the law. There are few, if any, areas of federal procedural practice that suffer as much from the lack of a uniform practice, as does this one. This case affords the Court an unusual opportunity to resolve three important issues on which district courts and courts of appeals have disagreed in removal cases.

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complaint reducing his damage demand from above to below the jurisdictional minimum).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed October 26, 2000]

No. 99-6348

SHIRLEY K. ROGERS,
Plaintiff-Appellant,

v.

WAL-MART STORES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 99-02342 – Jon Phipps McCalla, District Judge.

Argued: September 13, 2000

Decided and Filed: October 26, 2000

Before: GUY and MOORE, Circuit Judges; DOWD, District Judge.*

OPINION

DOWD, District Judge.

I. Introduction

This case arises out of injuries suffered by Shirley K. Rogers when she tripped and fell on a wooden pallet located in the aisle of a Wal-Mart store in Memphis, Tennessee. Rogers contends that employees of Wal-Mart acted negligently in leaving the pallet in a shopping area.

On October 17, 1997, Rogers filed a complaint in Tennessee state court asserting her negligence claims and seeking approximately $950,000 in damages. On November 18, 1997, Wal-Mart answered and removed to the United States District Court for the Western District of Tennessee on the grounds of complete diversity among the parties and an amount in controversy exceeding $75,000. On October 9, 1998, the parties stipulated to dismissal, and on October 14, 1998, the district court entered an order dismissing the case without prejudice.

On February 4, 1999, Rogers filed a new complaint in Tennessee state court. The second complaint, arising out of

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* The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

the same occurrence, specified that Rogers sought to recover an amount "not exceeding $75,000." Wal-Mart filed another notice of removal based on answers to interrogatories in the first case in which Rogers estimated her damages at $447,000. Rogers filed a motion to remand on May 14, 1999, asserting that the amount-in-controversy requirement for diversity jurisdiction had not been met. Along with her motion to remand, Rogers submitted an affidavit stating that she "had no intention of seeking additional damages against Wal-Mart Stores, Inc." and that she had "instructed [her] attorney to stipulate that [her] demand for damages will not exceed $75,000 at any time in the future." Rogers also attached a stipulation admitting that her total damages did not exceed $75,000 and stating that she would not seek leave of court to amend her complaint for additional damages. Meanwhile, Wal-Mart moved the district court, pursuant to Fed.R.Civ.P. 41(d), to award costs and fees for the previously dismissed action.

The district court denied Rogers' motion to remand on June 23, 1999. On the same day, the district court granted Wal-Mart's Rule 41(d) motion and ordered Rogers to pay costs and attorney fees from the original action representing work that would not benefit Wal-Mart in the second action. The district court also stayed the proceedings and gave Rogers fourteen days to pay Wal-Mart the costs and fees. On September 2, 1999, the district court dismissed the case without prejudice due to Rogers' non-payment of Wal-Mart's costs and fees from the first action.

Rogers has appealed the district court's June 23, 1999 Order denying her motion to remand; its Order of June 23, 1999 granting costs under Fed.R.Civ.P. 41(d); and its Order

and Judgment entered on September 2, 1999 dismissing the case without prejudice with costs taxed to the plaintiff.

II. Removal

We review *de novo* the existence of subject matter jurisdiction as a question of law; factual determinations regarding jurisdictional issues are reviewed for clear error. *See Gafford v. General Elec. Co.*, 997 F.2d 150, 155 (6th Cir. 1993). We also review *de novo* the denial of a motion to remand. *See Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996).

Generally, a civil case brought in a state court may be removed by a defendant to federal court if it could have been brought there originally. 28 U.S.C. § 1441(a). A federal district court has original "diversity" jurisdiction where the suit is between citizens of different states and the amount in controversy exceeds $75,000, exclusive of costs and interest. 28 U.S.C. 1332(a). A defendant removing a case has the burden of proving the diversity jurisdiction requirements. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921).

A problem arises where, as here, a plaintiff alleges an amount in controversy below the jurisdictional amount. Generally, because the plaintiff is "master of the claim," a claim specifically less than the federal requirement should preclude removal. *See Gafford v. General Elec. Co.*, 997 F.2d 150, 157 (6th Cir. 1993). State counterparts to Fed.R.Civ.P. 54(c) might enable a plaintiff to claim in her complaint an amount lower than the federal amount in controversy but nevertheless seek and recover damages exceeding the amount prayed for. *Id.* Tennessee has one such

rule. Its Civil Procedure Rule 54.03 provides that, except in the case of default, "every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." In such situations, the removing defendant must show that it is "more likely than not" that the plaintiff's claims meet the amount in controversy requirement. *Gafford*, 997 F.2d at 158.

To meet its burden for removal, the defendant in this case relied on the fact that plaintiff's first action sought nearly $1 million and that plaintiff made sworn responses to discovery requests stating that her amount of damages exceeded $447,000. The district court cited these facts in finding that it was more likely than not that the amount in controversy exceeded $75,000. Rogers, however, argues that the district court should have granted her motion to remand because she (1) filed a complaint in the second action seeking damages under the jurisdictional amount; and (2) stipulated that her damages were under the required amount in controversy for diversity jurisdiction.

Neither of these facts suffices to require a remand to state court. This circuit has recognized a rule that the determination of federal jurisdiction in a diversity case is made as of the time of removal. *See Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996). Hence, in reviewing the denial of a motion to remand, a court looks to "whether the action was properly removed in the first place." *Id.* (citing *Fakouri v. Pizza Hut of Am., Inc.*, 824 F.2d 470, 472 (6th Cir. 1987)). If one does not take into account plaintiff's post-removal stipulation, then there is no question that the district court was correct to deny the motion to

remand because defendant showed that, at the time of removal, the amount in controversy was "more likely than not" above the $75,000 pleaded in plaintiff's complaint.[1]

Therefore, the main issue here is the effect, if any, of plaintiff's stipulation. The Seventh Circuit has held that a post-removal stipulation reducing the amount in controversy to below the required jurisdictional amount is ineffective to deprive a district court of jurisdiction. *See In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992). The court based its decision on *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938), in which the Supreme Court considered whether a post-removal amendment of a complaint could destroy diversity jurisdiction. In ruling that it could not, the *St. Paul* Court stated that "[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." *Id. at 290.* On the strength of this rule, the *Shell Oil* court reasoned that "because jurisdiction is determined as of the instant of removal, a post-removal affidavit or stipulation is no more effective than a post-removal amendment of the complaint." 970 F.2d at 356; *see also Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 429 (7th Cir. 1997) ("because the stipulation came one month post-removal, [it was] too late for the court to consider").

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[1] Plaintiff argues that if the amount prayed for in a complaint may be disregarded in determining the amount in controversy, it would "open the floodgates" to federal jurisdiction over any cases filed in state court. This argument has long since been settled by cases like *Gafford*, which establish tests for determining when a court can find jurisdiction despite a pleading that states an amount below the required level.

Although no published opinion of this circuit has directly addressed the effect of a post-removal stipulation on diversity jurisdiction, in *Sanford v. Gardenour*, No. 99-5504, 2000 WL 1033025 (6th Cir. July 17, 2000), the court found there was jurisdiction even though the plaintiffs had stipulated after removal that "the amount they were seeking was less than $75,000." *Id.* at *2. The plaintiffs had made Rule 26 disclosures that the amount of damages was about $500,000. In addition, the plaintiffs' stipulation had not been binding--a fact the court used to distinguish its case from several district court cases that had given effect to a binding post-removal stipulation. *Id.* at *3. Also, in *Mitchell v. White Castle Sys., Inc.*, No. 94-1193, 1996 WL 279863 (6th Cir. May 24, 1996), although noting that the plaintiff had offered to file a post-removal stipulation, the court interpreted *St. Paul* as holding that "a post-removal stipulation has no effect on federal jurisdiction over the original complaint." *Id.* at **2 n.2.

We conclude that post-removal stipulations do not create an exception to the rule articulated in *St. Paul*. Because jurisdiction is determined as of the time of removal, events occurring after removal that reduce the amount in controversy do not oust jurisdiction. Therefore, consistent with *St. Paul* and previous unpublished Sixth Circuit opinions, we hold that a post-removal stipulation reducing the amount in controversy to below the jurisdictional limit does not require remand to state court. This rule is grounded not only in precedent, but also in sound policy. If plaintiffs were able to defeat jurisdiction by way of a post-removal stipulation, they could unfairly manipulate proceedings merely because their federal case begins to look unfavorable. Moreover, the interests of

simplicity and uniformity dictate that post-removal stipulations be treated just like any other post-removal event.

Several district courts have given effect to binding, post-removal stipulations; however, we do not see merit in their reasoning. In *Moss v. Voyager Ins. Cos.*, 43 F. Supp. 2d 1298 (M.D. Ala. 1999), the court distinguished cases from the Fifth, Sixth and Seventh Circuits on the ground that the stipulations in those cases had "failed to specifically bind the plaintiffs to accept no more in damages than the requisite jurisdictional amount." *Id.* at 1302; *see also Adkins v. Gibson,* 906 F. Supp. 345 (S.D. W.Va. 1995). Reaching the same result with different reasoning, the courts in *Bailey v. Wal-Mart Stores, Inc.*, 981 F. Supp. 1415 (N.D. Ala. 1997) and *Goodman v. Wal-Mart Stores, Inc.*, 981 F. Supp. 1083 (M.D. Tenn. 1997) ruled that the 1988 amendments to 28 U.S.C. § 1447(c) superseded the *St. Paul* rule that post-removal actions by the plaintiff cannot deprive a court of diversity jurisdiction.[2] Those courts reasoned that in changing § 1447(c), Congress was responding to *St. Paul*. Further, they interpreted the word "shall" in the newer version to mandate remand--even where the plaintiff reduces his demand three days before trial or merely amends his complaint rather than submits a stipulation. *Bailey,* 981 F. Supp. at 1415;

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[2] The older version of § 1447(c) called for remand whenever the judge realized "that the case was removed improvidently and without jurisdiction." This subsection was changed to read: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

Goodman, 981 F. Supp. at 1084; *see also Oder v. Buckeye State Mut. Ins.*, 817 F. Supp. 1413, 1414 (S.D. Ind. 1992).

Although these cases are interesting for their result, this circuit has already rejected the notion that the 1988 amendment to § 1447(c) directs district courts to look beyond the time of removal in deciding remand motions based on lack of jurisdiction. *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1348 & n.11 (6th Cir. 1993); *see also Fuller v. Exxon Corp.*, 78 F. Supp. 2d 1289, 1297 n.16 (S.D. Ala. 1999) (discussing cases and concluding that the 1988 amendments do not supersede *St. Paul*). In addition, the fact that a stipulation might be binding should not determine whether it is effective to deprive the federal court of diversity jurisdiction. The same potential for forum shopping and manipulation exists whether or not a stipulation is binding. The same interests in efficiency and simplicity also exist where there is a binding stipulation. Hence, the reasoning that leads us to deny effect to post-removal stipulations generally, also leads us to deny effect to post-removal stipulations that are binding.[3]

Because state law would have allowed plaintiff to recover damages in excess of what she prayed for, it was

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[3] The defendant has argued that its lack of approval means the stipulation is not binding. Other courts have treated such stipulations as binding nonetheless. *See, e.g., Asociacion Nacional de Pescadores a Pequena Escala O Artesanales de Colombia v. Dow Quimica de Colombia, S.A.*, 988 F.2d 559, 565 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *Adkins v. Gibson*, 906 F. Supp. 345, 348 (S.D. W.V. 1995). We find defendant's argument unconvincing and do not rely on it.

"more likely than not" that her damages would exceed $75,000 given her previous demands and representations. Plaintiff's post-removal stipulation has no effect because jurisdiction is decided as of the time of removal. The district court did not err in denying plaintiff's motion to remand.

III. The Award of Costs, Including Attorney Fees

The district court thoroughly examined Wal-Mart's itemized accounting of the costs and fees it incurred in defending against Rogers' earlier suit. The court awarded the full $185 in costs, but reduced the $1,888 of requested attorney fees by $306.45, to account for those fees which "remain[ed] of benefit in this matter[.]" The court ordered Rogers to pay Wal-Mart $ 1766.55. Rogers has contested this award of "costs" and the subsequent dismissal of her case.

Fed.R.Civ.P. 41(d) provides:

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

A district court's grant of a Rule 41(d) motion and related order of dismissal are reviewed for abuse of discretion. *See Duffy v. Ford Motor Co.*, 218 F.3d 623, 633 (6th Cir. 2000).

Rogers declares that she "merely wished to litigate her claims in state court" and relies on a couple of cases in which a court refused to award costs under Rule 41(d) because the court found no evidence of vexatious intent. *See Wahl v. City of Wichita,* 701 F. Supp. 1530, 1533 (D. Kan. 1988); *Sewell v. Wal-Mart Stores, Inc.,* 137 F.R.D. 28 (D. Kan. 1991). Rogers' claim of pure motive does not win the day because "nothing in the language of Rule 41(d) . . . suggests that a defendant must show 'bad faith' before a district court can order payment of costs incurred in a voluntarily dismissed previous action." *Esquivel v. Arau,* 913 F. Supp. 1382, 1388 (C.D. Cal. 1996). In addition, Rogers fails to mention that Rule 41(d) is meant not only to prevent vexatious litigation, but also to prevent forum shopping, "especially by plaintiffs who have suffered setbacks in one court and dismiss to try their luck somewhere else." *See Robinson v. Nelson,* No. 98-10802-MLW, 1999 WL 95720, at *2 (D. Mass. Feb. 18, 1999). Hence, Rule 41(d) is also intended to prevent attempts to "gain any tactical advantage by dismissing and refiling th[e] suit." *Sewell v. Wal-Mart Stores, Inc.,* 137 F.R.D. at 29.

As Wal-Mart points out, Rogers did not seek to dismiss the initial action until after she had missed the court's deadline for disclosing her expert witnesses. This evidences at least some attempt to wipe the slate clean after an initial setback in federal court and gain a tactical advantage by re-filing in state court. Hence, the district court did not abuse its discretion in awarding costs of $185 to Wal-Mart.

Rogers also specifically contests the district court's inclusion of attorney fees as part of its award of "costs" under Rule 41(d). There is a split of authority as to whether Rule 41(d) authorizes attorney fees as part of an award of "costs,"

but it seems that the majority of courts find that attorney fees are available under Rule 41(d). The Sixth Circuit has recently recognized the split but declined to make a ruling: "although . . . most courts have concluded that attorney fees may be awarded under Rule 41(d), the matter is far from settled in this circuit or in most others." *Duffy v. Ford Motor Co.*, 218 F.3d at 632.

We now hold that attorney fees are not available under Rule 41(d). The reason is simple--the rule does not explicitly provide for them. Where Congress has intended to provide for an award of attorney fees, it has usually stated as much and not left the courts guessing. Further, the law generally recognizes a difference between the terms "costs" and "attorney fees" and we have no desire to conflate the two terms. Rather, we must assume that Congress was aware of the distinction and was careful with its words when it approved Rule 41(d).[4]

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[4] Of course, we realize that Congress itself did not choose the words contained in the rule. The language actually resulted once Congress declined to exercise its veto power following the usual rule-making process. One commentator has described this process succinctly:

> . . . The Supreme Court has the power to "prescribe general rules of practice and procedure" for the federal courts, and the Judicial Conference of the United States has the authority to recommend rule changes to the Supreme Court. The Judicial Conference in turn oversees a committee structure that includes a Standing Committee on Rules of Practice and Procedure

We realize that an award of attorney fees may be authorized, even if not expressly provided for, "if the statute otherwise evinces an intent to provide for such fees." *Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994). However, the structure of the Federal Rules of Civil Procedure is ambiguous at best on the question of attorney fees. For instance, whereas Rule 41(d) only speaks of "costs" and does not mention attorney fees, several other provisions in the Federal Rules explicitly provide for recovery of attorney fees. *See Simeone v. First Bank Nat'l. Ass'n*, 125 F.R.D. 150, 155 (D. Minn. 1989) (listing Fed.R.Civ.P.

> appointed by the Chief Justice of the Supreme Court and various advisory committees accountable to the Standing Committee. The Advisory Committee on Civil Rules, which consists of judges, lawyers, and legal academics, is responsible for the Federal Rules of Civil Procedure.
>
> There are several stages in the rulemaking process. A proposed rule is first considered by the Advisory Committee. If the Advisory Committee approves the proposal, it is then reviewed by the Standing Committee and finally by the Judicial Conference before being forwarded to the Supreme Court. If the Supreme Court concurs, the proposal is transmitted to Congress, which then has roughly seven months to exercise a veto. In the absence of a veto, the proposed rule goes into effect.

Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 Geo.L.J. 887, 892-93 (footnotes omitted).

30(g)(2), 37(a)(4), 37(c), 37(d) & 56(g)). In addition, Title 28 U.S.C. § 1920 lists the items a court may tax as "costs" to a prevailing party under Rule 54(d) but does not include attorney fees. *Id.*; *see also Anders v. FPA Corp.*, 164 F.R.D. 383, 390 (D.N.J. 1995) (denying attorney fees in part because of lack of express authorization). The non-inclusion of attorney fees under § 1920 indicates that, at least in some contexts, Congress does not consider attorney fees to be part of an award of "costs."

Of course, many courts have permitted an award of attorney fees under Rule 41(d). They often rely on what they consider to be the policy behind the rule and, in our view, give too little weight to its plain language. *See, e.g.*, *Behrle v. Olshansky,* 139 F.R.D. 370, 372-73 (W.D. Ark. 1991). In addition, some courts find attorney fees available under Rule 41(d) because, in their view, there ought to be a certain parallelism between Rule 41(d) and Rule 41(a)(2), which also does not explicitly mention attorney fees. In *Esquivel v. Arau,* 913 F. Supp. 1382, 1391 (C.D. Cal. 1996), for instance, the court reasoned that because Rule 41(a)(2) permits a court to condition voluntary dismissal without prejudice on payment of attorney fees, Rule 41(d) also ought to permit attorney fees. The reasoning is that because both rules are intended to prevent vexatious litigation and forum shopping, "it would be inconsistent to conclude that a court has discretion to condition Rule 41(a)(2) voluntary dismissal without prejudice on payment of attorney fees, but that a court does not have discretion to exact the same payment from a plaintiff who has noticed a Rule 41(a)(1) dismissal in a previous case." *Esquival,* 913 F. Supp. at 1391.

One commentator accounts for this "anomaly" by suggesting that Rule 41(a)(2) contemplates a negotiation between the court and the litigant, but Rule 41(d) does not. Hence, these two rules are meant to "operate differently." *See* Edward X. Clinton, Jr., *Does Rule 41(d) Authorize an Award of Attorney's Fees?*, 71 St. John's L. Rev. 81, 86 (1997). We do not hang our hat on this rationale; but we note it as further evidence that the structure of the Federal Rules of Civil Procedure is not so clear on this issue that it overcomes the absence of an express provision for attorney fees in Rule 41(d). In short, we are persuaded by the fact that Congress did not explicitly provide for attorney fees in Rule 41(d). We do not find that the structure of the Civil Rules is so unambiguous that we can divine a contrary intent on the part of Congress. And we think it improper to essentially re-draft the rule ourselves by reading into it language that is not there.

For these reasons, that portion of the district court's order which awarded Wal-Mart $1581.55 in attorney fees cannot stand.

IV. Conclusion

We AFFIRM the district court's denial of the motion to remand and we VACATE the district court's award of costs insofar as it awarded attorney fees. Further, we REMAND with instructions for the district court to enter an order that, upon payment of costs in the sum of $185 within thirty (30) days of the date of the district court's order, plaintiff's case will be reinstated on the district court docket.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed October 26, 2000]

No. 99-6348

SHIRLEY K. ROGERS, *Plaintiff-Appellant,*	)
v.	)
WAL-MART STORES, INC., *Defendant-Appellee.*	)

Before: GUY and MOORE, Circuit Judges;
DOWD, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court denying plaintiff Shirley Roger's motion to remand is AFFIRMED and the court's award of costs insofar as it awarded attorney fees is VACATED. IT IS FURTHER ORDERED that the case is

REMANDED for further proceedings in accordance with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed June 23, 1999]

No. 99-2342 M1/A

SHIRLEY K. ROGERS, *Plaintiff*,	)
v.	)
WAL-MART STORES, INC., *Defendant*.	)

ORDER

The Court held a scheduling conference in this matter on June 8, 1999, Ted Angelakis, Esq. appeared for Plaintiff Shirley Rogers and Cameron Jehl, Esq. appeared for Defendant Wal-Mart Stores.

This matter arises from an accident that occurred while Plaintiff was shopping at one of Plaintiff's stores. She contends that Defendant's employees left a wooden pallet in an aisle which caused her to fall and injure herself. Plaintiff alleges that Defendant's employees acted negligently in

leaving this obstruction in an open shopping area and seeks damages for her losses arising from this incident.

Plaintiff originally filed an action arising from these facts in Tennessee court. Defendant removed that action to the Western District of Tennessee, asserting that the Court had jurisdiction due to the complete diversity of the parties and that Plaintiff sought over $75,000 in damages. Plaintiff then voluntarily dismissed that case.

Soon after, Plaintiff filed the present action, again in Tennessee court, seeking $75,000 in damages. Defendant again removed the matter to this Court, invoking its diversity jurisdiction. In light of Plaintiff's prior complaint and Plaintiff's responses to Defendant's First Set of Interrogatories in the previous matter (Def.'s Resp. Pl.'s Mot. to Remand, Ex. A. at 8-9.) and for the reasons discussed at the conference, the Court finds that it has subject matter jurisdiction over this matter. See Gafford v. General Elec. Co., 997 F.2d 150, 157 (6th Cir. 1993); see also Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 428-29 (7th Cir. 1997). Accordingly, Plaintiff's motion for remand and for costs is DENIED.

Pursuant to the discussion during the conference, the following dates are established as the final dates for:

JOINING PARTIES: June 15, 1999.

AMENDING PLEADINGS: August 15, 1999.

COMPLETING ALL DISCOVERY: January 5, 2000.

(a) EXPERT DISCLOSURE (Rule 26):

(1) DISCLOSURE OF DIRECT RULE 26 EXPERT INFORMATION: November 15, 2000.

(2) DISCLOSURE OF REBUTTAL RULE 26 EXPERT INFORMATION: December 15, 1999.

(b) REQUESTS FOR DOCUMENTPRODUCTION AND ADMISSIONS: December 15, 1999.

FILING PRETRIAL MOTIONS (INCLUDING MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS IN LIMINE); February 2, 2000.

TRIAL AND PRETRIAL DATES

This jury trial is expected to last three days.

1. This case is set for **JURY TRIAL** beginning at 2:00 p.m. on March 27, 2000.

2. A **PRETRIAL CONFERENCE** will be held in this case at 9:00 a.m. on March 20, 2000.

3. A **JOINT PRETRIAL ORDER** shall be submitted no later than 5:00 p.m. on March 13, 2000. Any voit dire questions and proposed jury instructions shall be submitted by the parties on the date of submittal of the joint pretrial order.

Absent good cause shown, the dates established by this Order will not be extended or modified.

The opposing party may file a response to any motion filed in this matter. Neither party may file an additional reply, however, without leave of the Court. If a party believes that a reply is necessary, it shall file a motion for leave to file a reply accompanied by a memorandum setting forth the reasons for which a reply is required.

Consistent with the August, 1998 Committee on Rules of Practice and Procedure of the Judicial Conference of the United States' preliminary draft of proposed amendments to the Federal Rules of Civil Procedure, unless authorized by the Court, no deposition shall exceed one day of seven hours in length. Each party is limited to ten depositions unless authorized by the Court.

ENTERED this 23 day of June, 1999.

/s/_____
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

APPENDIX C

28 U.S.C.§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.